

Merchants Transportation of California, Inc. and Brotherhood of Teamsters, Auto Truck Drivers, Car Haulers and Helpers, Local No. 70, International Brotherhood of Teamsters, AFL-CIO. Case 32-CA-13930

July 27, 1994

DECISION AND ORDER

BY MEMBERS STEPHENS, DEVANEY, AND BROWNING

On May 20, 1994, the General Counsel of the National Labor Relations Board issued a complaint alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 32-RC-3791. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) On June 3, 1994, the Respondent filed an answer to the complaint and on June 29, 1994, filed an amended answer to complaint, with affirmative defenses admitting in part and denying in part the allegations in the complaint.

On June 10, 1994, the General Counsel filed a Motion for Summary Judgment and memorandum in support. On June 15, 1994, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On June 27, 1994, the Union filed a joinder in Motion for Summary Judgment. On June 29, 1994, the Respondent filed a reply to Notice to Show Cause and statement in opposition to Motion for Summary Judgment.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answer and amended answer the Respondent admits its refusal to bargain but attacks the validity of the certification on the basis of its objections to conduct affecting the results of the election, the Board's disposition of certain challenged ballots, and the Board's unit determination in the representation proceeding.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable

in this unfair labor practice proceeding.¹ See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all times material herein, the Respondent, a corporation with an office and place of business in San Leandro, California, has been engaged in business as a common and contract carrier.

During the 12-month period preceding issuance of the complaint the Respondent, in the course and conduct of its business operations, derived gross revenues in excess of \$50,000 from the transportation of freight moving in interstate commerce.

Based on its operations, the Respondent functions as an essential link in the transportation of freight in interstate commerce. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the election held December 16 and 17, 1993, the Union was certified on January 21, 1994, as the collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time employees, including line drivers, city drivers, dock workers, mechanics, and plant clerical employees employed by Respondent at its San Leandro, California facility; excluding all office clerical employees, sales employees, guards, and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

¹ In its amended answer, the Respondent argues for the first time that an employee voted in the election who would not have been employed at the time of the election had the Respondent been aware of the employee's misconduct. The Respondent further alleges that the employee concealed his misconduct in order to vote in the election. We reject the Respondent's contention that we should not order bargaining with the Union on the basis of this allegation. The Respondent's allegation is in the nature of a postelection challenge and is rejected. *Oppenheim Collins & Co.*, 108 NLRB 1257 (1954). We also reject the Respondent's further allegation that the employee was an agent of the Union. That issue was litigated and decided in the representation proceeding.

B. *Refusal to Bargain*

Since April 27, 1994, the Union has requested the Respondent to bargain, and, since May 2, 1994, the Respondent has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing on and after May 2, 1994, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Merchants Transportation of California, Inc., San Leandro, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Brotherhood of Teamsters, Auto Truck Drivers, Car Haulers and Helpers, Local No. 70, International Brotherhood of Teamsters, AFL-CIO, as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time employees, including line drivers, city drivers, dock workers,

mechanics, and plant clerical employees employed by Respondent at its San Leandro, California facility; excluding all office clerical employees, sales employees, guards, and supervisors as defined in the Act.

(b) Post at its facility in San Leandro, California, copies of the attached notice marked "Appendix."² Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Brotherhood of Teamsters, Auto Truck Drivers, Car Haulers and Helpers, Local No. 70, International Brotherhood of Teamsters, AFL-CIO as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All full-time and regular part-time employees, including line drivers, city drivers, dock workers, mechanics, and plant clerical employees employed by us at our San Leandro, California facility; excluding all office clerical employees, sales em-

²If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ployees, guards, and supervisors as defined in the Act.

MERCHANTS TRANSPORTATION OF CALI-
FORNIA, INC.